

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

REGIONAL AIR, INC.,

Plaintiff,

v.

CANAL INSURANCE COMPANY,

Defendant,

Case No. CIV-08-342-C

PLAINTIFF, REGIONAL AIR'S PROPOSED JURY INSTRUCTIONS

COMES NOW the Plaintiff, Regional Air, Inc., and requests the following proposed Jury Instructions to be submitted in this matter.

Respectfully submitted,

GODLOVE, MAYHALL, DZIALO,
DUTCHER & ERWIN

By: 

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Attorney for Plaintiff


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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January 2009, a true and correct copy of Plaintiff's Proposed Jury Instructions was sent via ECF to:

Harris A. Phillips, Esq.
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Attorney for Defendant


Edward W. Dzialo, Jr. OBA#2579

Instruction Number _____

Issues in the Case – No Counterclaim

The parties in this case are Regional Air, Inc., the Plaintiff and Canal Insurance Company, the Defendant. The parties admit:

On April 19, 2001, Canal Insurance Company executed and delivered to Regional Air, Inc., in Lawton, Oklahoma Policy #A332408 insuring a 2000 Volvo tractor for the sum of \$95,211.00 with a deductible of \$1,000.00 and a 1999 utility van for \$23,000.00 with a deductible of \$1,000.00.

On June 13, 2001, the 2000 Volvo tractor was involved in a collision in Louisiana. Canal Insurance Company, by and through its authorized agent Aero Adjustment Bureau, investigated the accident and sent its report to Canal Insurance Company. Aero Adjustment Bureau tendered a settlement draft on August 2, 2001, in the amount of \$34,494.14 together with a "Proof of Loss, Settlement and Subrogation Agreement" on the tractor. By letter of August 7, 2001, Regional Air advised Aero Adjustment Bureau that the offer of settlement was unacceptable.

On March 21, 2003, Regional Air made a demand upon Canal Insurance Company for \$94,211.00 representing the property damage limits, less deductible, on the 2000 Volvo tractor. Canal Insurance Company treated the letter as a submission of a Proof of Loss and invoked the policy appraisal process on or about April 15, 2003.

Regional Air filed a lawsuit in the District Court of Comanche County on June 11, 2003. The Court directed the parties to engage in the appraisal process contained in the insurance policy.

**Plaintiff, Regional Air's Proposed
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On March 1, 2007, Mr. Mark L. Oldham was appointed as an umpire by virtue of the random drawing from a list of adjusters. On or about February 18, 2008, Mr. Oldham mailed the appraisal award to the parties. On February 21, 2008, the Comanche County case was dismissed without prejudice and refiled in the U.S. District Court for the Western District of Oklahoma on April 2, 2008.

Regional Air, Inc. seeks to set aside or vacate the appraisal award.

Instruction Number _____

Explanation to Jury Panel of Voir Dire

As possible jurors you will be questioned to determine your qualifications to serve in this case. The purpose of these questions is to obtain a fair jury. Since this is an important part of the trial, it is necessary that you be given an oath to answer truthfully all questions asked you about your qualifications to serve as jurors. Will you please stand, raise your right hand, and the oath will now be given to you by

_____.

OUJI 1.1

Instruction Number _____

Oath On Voir Dire

Do you solemnly swear that you will truly and fully answer all questions asked you by the Judge or the lawyers to serve as a juror in the case now on trial, so help you God?

[Juror should be required to answer "I do."].

OUJI 1.2

or

Do you affirm under the pains and penalties of perjury to truly and fully answer all questions asked you by the Judge or lawyers to serve as a juror in the case now on trial?

[Juror should be required to answer "I do."].

OUJI 1.2

Instruction Number _____

**Jury's Duties — Cautionary Instructions —
To Be Given After Jury Is Sworn**

Members of the Jury: I will now explain to you your duties as jurors. It is vital to the administration of justice that you fully understand and faithfully perform these duties.

It is my duty to determine all of the law applicable to this case and to inform you of that law by these instructions and by the instructions that I will give you after all evidence has been received. It is your duty to accept and follow all of these instructions as a whole, not accepting one or more of these instructions and disregarding the others.

It is your duty to determine the facts of this case from the evidence produced in open court. You should consider only the evidence introduced while the court is in session. It is then your duty to apply the law, as determined by the court, to the facts as determined by you, and thus render a verdict. You should not allow sympathy or prejudice to influence your decision. Your decision should be based upon probabilities, and not possibilities. It may not be based upon speculation or guesswork.

The evidence which you are to consider consists of the testimony of the witnesses; the exhibits, if any, admitted into evidence; any facts admitted or agreed to by the attorneys; and any facts which I instruct you to accept as true. The term "witness" means anyone who testifies in person, or by deposition, including the parties.

**Plaintiff, Regional Air's Proposed
Jury Instructions**

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In addition, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified when considered with the aid of the knowledge which you each possess in common with other persons. You may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which you find to have been established by the testimony and evidence in the case.

The production of evidence in court is governed by rules of law. From time to time it may be the duty of the attorneys to object to the production of evidence and my duty to rule on these objections. If I say the objection is sustained, you must not consider the testimony or exhibit covered by the objection. If I say the objection is overruled, you may consider the testimony or exhibit covered by the objection. The attorney's objections, and my rulings upon these objections, together with the reasons for these objections and rulings are not evidence and should not be considered by you.

The statements, remarks and arguments of the attorneys are intended to help you in understanding the evidence and applying the law, but are not evidence. If any statement, remark or argument of an attorney has no basis in the evidence, then you should disregard it.

You are the sole judges of the believability of each witness and the value to be given the testimony of each. You should take into consideration the witness's means of knowledge, strength of memory and opportunities of observation. Also consider the reasonableness, consistency or inconsistency of the testimony. You should also consider the bias, prejudice or interest, if any, the witness may have in the outcome of the trial,

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the conduct of the witness upon the witness stand and all other facts and circumstances that affect the believability of the witness.

My rulings and remarks made during the course of this trial are not intended to indicate my opinion as to the facts. During all recesses and adjournments, while this case is in progress, you must not discuss this case, or anything about this case, with anyone, and you must not allow anyone to discuss it with you. This rule applies not only to court employees, the attorneys involved in this case, and others you may meet in the courthouse, but also to your husband and wife, other members of your family, your friends and anyone else you may meet. If during the trial anyone talks to you or tries to talk to you about this case, you must immediately report it to me, or the clerk of the bailiff, who will report to me.

Do not, before this case is finally submitted to you for a decision, talk to your fellow jurors about this case, or anything about this case, or form or express any opinion about it.

Do not read newspaper reports or obtain information from the internet about this trial or the issues, parties or witnesses involved in this case, and do not watch or listen to television or radio reports about it. Do not attempt to visit the scene or investigate this case on your own.

The reasons for these rules are that it is essential that you should keep your minds free and open at all times throughout this trial and that you should not be influenced by anything except the evidence you hear and see in the courtroom.

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From now on, at the beginning of each recess or adjournment, I will refer to these instructions as "my instructions" or "my usual instructions," but whether or not this is done, you will carefully observe these rules at all times.

OUII 1.4

Instruction Number _____

Oath Administered To Jury

Do you solemnly swear that you will well and truly try the matter submitted to you in the case now on trial and reach a true verdict, according to the law and the evidence presented to you, so help you God?

[Juror should be required to answer "I do."].

OUJI 1.3

or

Do you affirm under the pains and penalties of perjury that you will well and truly try the matters submitted to you in the case now on trial and a true verdict render, according to the law and the evidence?

[Juror should be required to answer, "I do."].

OUJI 1.3

Instruction Number _____

**Jury's Duties — Introduction to Instructions —
To Be Given After the Evidence**

It is now my duty to further explain your duties as jurors, and to further inform you of the law applicable to this case. It is your duty to faithfully perform your duties and to accept and follow all instructions of the law as a whole, including the instruction I gave you at the beginning of this trial [and the instructions I gave you during the course of this trial]. You are not free to accept and follow one or more of these instructions and disregard the other.

A written copy of all instructions will be given to you before you begin your deliberations.

OUJI 1.6

Instruction Number_____

**Burden of Proof –
Greater Weight of the Evidence**

In a civil lawsuit, such as this one, the law provides which party is to prove certain things to you. This is called "Burden of Proof."

When I say that a party has the burden of proof on any proposition by the greater weight of the evidence, or use the expression "if you find," or "if you decide", I mean you must be persuaded, considering all the evidence in the case, that the proposition on which such party has the burden of proof is more probably true than not true. The greater weight of the evidence does not mean the greater number of witnesses testifying to a fact, but means what seems to you more convincing and more probably true.

A party who seeks to recover on a claim, or a party who raises an affirmative defense has the burden to prove all the elements of the claim or defense. In deciding whether a party has met the burden of proof, you are to take into account all the evidence, whether offered by that party or any other party.

OUJI 3.1

Camden Fire Ins. Ass'n v. Walker et. al, 238 P. 462 (Okl. 1925)

Instruction Number_____

Determining Credibility [Believability] Of Witness

You are the sole judges of the believability of each witness and the value to be given the testimony of each. You should take into consideration the witness's means of knowledge, strength of memory and opportunities for observation. Also consider the reasonableness and consistency or inconsistency of the testimony.

You should also consider the bias, prejudice, or interest, if any, the witness may have in the outcome of the trial, the conduct of the witness upon the witness stand, and all other facts and circumstances that affect the believability of the witness.

OUII 3.13

Instruction Number _____

Expert Witness

There has been introduced the testimony of witnesses who are represented to be skilled in certain areas. Such witnesses are known in law as expert witnesses. You may consider the testimony of these witnesses and give it such weight as you think it should have, but the value to be given their testimony is for you to determine. You are not required to surrender your own judgment to that of any person testifying as an expert or otherwise. The testimony of an expert, like that of any other witness, is to be given such value as you think it is entitled to receive.

OUJI 3.21

Instruction Number_____

Agency --- Defined

The relationship of agency is created from the conduct [and/or] agreement of the parties showing that one is willing for the other to act for [him/her] subject to [his/her] control and that the other consents to so act. An agency relationship may arise under such circumstances even when the parties may not have intended to create one. The person who acts for another is called the agent and the other is called the principal.

In this case Canal Insurance Co. admits that it hired Aero Adjustment Bureau to investigate and adjust the property damage claim of Regional Air, Inc.

OUJI 6.2
Modified

Instruction Number _____

Ratification --- Definition and Effect

When one person acts or purports to act as an agent for another, but does so without authority, and the person for whom [he/she] acted thereafter confirms such action, by words or conduct, with knowledge of all the material facts, such words or conduct are a ratification of the act, and are the same as if it had been authorized originally.

If the principal ratifies any part of the act, [he/she/it] ratifies all of it.

OUJI 6.13

Instruction Number_____

Knowledge of Agent Imputable to Principal

Knowledge, or notice possessed by an agent while acting within the scope of his or her authority, is the knowledge of, or notice to, his or her principal.

In this case because Aero Adjustment Bureau as hired by Canal Insurance Co. to act as Canal Insurance Co.'s agent any knowledge or notice to received by Mr. Michael England and Mr. Charles England of Aero Adjustment Bureau is, as a matter of law, the knowledge and notice of Canal Insurance Co.

OUII 6.14
Modified

Instruction Number_____

Scope of Authority --- Defined

An agent is acting within the scope of his or her authority if he or she is engaged in the transaction of business that has been assigned to [him/her] by [his/her] principal, or if he or she is doing anything that may reasonably be said to have been contemplated as a part of his or her agency. It is not necessary that an act or failure to act must have been expressly authorized by the principal.

OUJI 6.8
Modified

Instruction Number _____

Duty to Follow Instructions

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. Corporations are entitled to the same fair trial at your hands as is a private individual. The law is no respecter of persons, and all persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

Instruction Number _____

Consideration of the Evidence

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections, or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

You are further instructed that your decision must be based upon probabilities, not possibilities. It may not be based on speculation or guess work.

Instruction Number _____

Direct and Circumstantial Evidence

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence - such as the testimony of an eye witness. The other is indirect or circumstantial evidence - the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the burden of proof in the case, both direct and circumstantial.

Instruction Number _____

Impeachment

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he or she testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

Instruction Number _____

Deposition Evidence

During the course of the trial, certain testimony has been read to you by way of deposition or shown to you by way of video deposition. You are instructed that you are not to discount this testimony for the sole reason that it comes to you in the form of a deposition. It is entitled to the same consideration, and the same judgment on your part with reference to its weight, as is the testimony of witnesses who have taken the stand.

Instruction Number _____

Charts and Summaries

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the records, and other documents which are in evidence in the case. However, such charts or summaries are not in and of themselves evidence or proof of any facts. If such charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

In other words, such charts or summaries are used only as a matter of convenience so if and to the extent that you find they are not in truth summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely.

Instruction Number _____

Objections – Ruling on Evidence – Questions to Witnesses

It is the duty of attorneys on each side of a case to object when the other side offers testimony or other evidence which counsel believes is not properly admissible.

When the Court has sustained an objection to a question, the jurors are to disregard the question and may draw no inference from the wording of it or speculate as to what the witness would have said if permitted to answer.

Upon allowing testimony or other evidence to be introduced over the objection of counsel, the Court does not indicate any opinion as to the weight or effect of such evidence. The jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence. The jury is instructed not to draw any inference for or against either side of the case by any ruling or comment made by the Court during the trial.

During the course of a trial the Court may also occasionally ask questions of a witness in order to bring out facts not then clear to the Court. The jury is instructed not to assume that the Court has any opinion on the matter to which the questions may relate.

Instruction Number _____

Formation of a Contract; Meaning of Words in a Contract

A contract is an agreement between parties to do or not to do certain things. An insurance policy such as the one involved herein is a contract.

In interpreting the meaning of an insurance contract entered into between an insurer and insureds, the following rules are to be considered:

First, insurance policies, like other contracts, are to be interpreted according to their terms and their terms cannot be modified or altered for a party's benefit.

Second, insurance contracts and provisions and terms in them are to be given their common, usual, and ordinary meaning unless it is shown that a technical meaning is intended.

OUJI 2d 23.2, 23.13 (Modified)

15 O.S. §§1, 160

Max True Plastering Company v. U.S. Fid. and Guaranty Co., 912 P.2d 861 (Okla. 1996)

Instruction Number _____

Breach of Contract

A contract is breached or broken when a party does not do what [he/she/it]
promised to do in the contract.

OUJI 23.21

Instruction Number _____

Elements Of A Claim For Breach Of Contract

Plaintiff, Regional Air, Inc. is required to prove by the greater weight of the evidence the following in order to recover on the claim for breach of contract against Canal Insurance Co.

1. Formation of a contract between Regional Air, Inc. and Canal Insurance Co.
2. Canal Insurance Co. breached the contract; and
3. Regional Air, Inc. suffered damages as a direct result of the breach.

It is stipulated and agreed that an insurance contract was formed between Regional Air, Inc. and Canal Insurance Co. making Regional Air, Inc. an insured under the policy. It is further stipulated and agreed that the insurance contract in effect at the time of the accident included property damage limits of \$95,211.00 less a \$1,000.00 deductible for the 2000 Volvo tractor.

OUJI 23.1
Modified

Instruction Number _____

General Measure of Damages

If you decide for Regional Air, Inc. on its claim for breach of contract, you must then fix the amount of its damages. This is the amount of money that is needed to put it in as good a position as it would have been if the contract had not been breached. In this case, the amount of damages should be determined as follows: the amount to which Regional Air, Inc. was entitled to receive for damages resulting from the accident which is not to exceed the property damage limits of the insurance policy - \$94,211.00.

OUJI 23.51

Instruction Number _____

Grounds to Vacate or Set Aside Appraisal Award

In order to vacate or set aside the appraisal award you must be satisfied by the greater weight of the evidence that Plaintiff has proven one of the following grounds:

1. That the appraisal award was unfairly made.
2. That there was a mistake in the appraisal award.
3. That there was misconduct in the appraisal proceedings or the appraisal award.
4. If Plaintiff's appraiser was not provided an opportunity to introduce evidence.

Camden Fire Ins. Ass'n v. Walker et. al. 238 P. 462 (Okl. 1925)

Aetna Ins. Co. v. Jester 132 P.130 (Okla 1913)

Mercantile Insurance Co. et. al. v. Murray 43 P.2d 451 (Okla 1935)

Aetna Ins. Co. v. Murray 66 F.2d 289 (10th Cir. 1933)

Milwaukee Mechanics' Ins. Co. et al. v. Sewell 168 P.660 (Okl. 1916)

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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

REGIONAL AIR, INC.,)	
)	
Plaintiff,)	
)	Case No. CIV-08-342-C
v.)	
)	
CANAL INSURANCE COMPANY,)	
)	
Defendant,)	

VERDICT FORM SETTING ASIDE APPRAISAL AWARD
(BREACH OF CONTRACT CLAIM)

We, the jury, empaneled and sworn in the above entitled cause, do, upon our oaths, find as follows:

On the breach of contract claim, we find in favor of the Plaintiff, Regional Air, Inc. that the appraisal award should be set aside and award it damages of \$_____.

Foreperson
